IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-316

CHARLES D. KERN, *Petitioner,*

v.

COMMONWEALTH OF VIRGINIA

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

The Federal Constitutional Questions Were Substantially Presented to the Supreme Court of Virginia and, Therefore, the Questions Are Properly Before This Court.

The Respondent in its Opposition to the Petition for Certiorari asserts that the petitioner did not present the Federal questions embraced in his Fifth and Sixth Amendment contentions raised in his petition for certiorari and hence this court has no standing to pass on the issues which were not properly raised in the Supreme Court of Virginia. (Page 4 of Respondent's Brief in Opposition to Certiorari.)

While the counsel representing the petitioner in the Supreme Court of Virginia did not refer to the Fifth and Sixth Amendments in the caption of the argument, the conflict raised by the petitioner's trial counsel as a witness and as his position as trial counsel is set forth in the Petition for the Appeal to the Supreme Court of Virginia, under the very question quoted by the respondent. The Petitioner made the following statement to the Supreme Court of Virginia in his petition for an appeal:

> "It is our *view that the conflict of counsel acting as a counsel and witness;* the statement of the defendant as to his state of mind immediately prior to his entering a plea of guilty; and the indication that the *defendant may not have realized that he was waiving his right to test Commonwealth's evidence by appeal are sufficient justification to allow withdrawal of his guilty plea.*" (Emphasis added.)

Petitioner's appellate counsel in the Supreme Court of Virginia in the argument under the very heading quoted by the respondent, *supra,* raised further Fifth and Sixth Amendment arguments by stating:

> "In the instant case, previous counsel for the defendant Kern advised the court that his client's desire to withdraw his plea of guilty stemmed from counsel's error in not explaining to the defendant that he was entitled to call witnesses at a prior motion to suppress. Counsel further indicated to the court that he was a material witness to the events surrounding the entry of the police officers into the Kern household and that he had not been representing the defendant and that had he not been representing the defendant, he would have appeared as a witness at that hearing." (Pp. 11 and 17 of petition brief on appeal to the Supreme Court of Virginia.)

Again in the argument under this very point that the respondent contends did not raise petitioner's rights to effective counsel under the Sixth Amendment and Due Process under the Fifth Amendment, the petitioner's counsel in the State Supreme Court of Virginia quoted the statement of the petitioner's trial counsel in the trial court showing not only was the issue raised on appeal but that it was raised in the trial court when the trial court was advised that unless the plea were withdrawn the trial counsel would be faced with a habeas corpus situation and collateral attack, on the judgment. This is reflected as follows:

> "MR. MORRIS: Your Honor, for the record, in reference to the instructions of the Court, might I respectfully suggest that along with the jurisdictional grounds, if any, that bear possible, that could be shown, I also advised him, the Defendant, Mr. Kern, that if for any reason that he subsequently found out, on my advice or other factors, that he would have a right to file a writ for a petition for habeas corpus. I bring that to the attention of the Court so we just don't eliminate that fact, and I did advise him of the facility of that writ." (Page 12, Petitioner's Brief on Appeal to the Supreme Court of Virginia.)
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> "THE COURT: Well, of course, if there are facts on the ground for habeas corpus that exist, he would certainly have a right to file that. But insofar as appealing this particular decision of the case, and other matters in jurisdiction.
>
> "MR. MORRIS: It goes to jurisdiction.
>
> "THE COURT: It forecloses any but jurisdictional. (Tr. 6, 7, 9/11/73)."

We must assume that the Supreme Court of Virginia read the entire Petition for an Appeal. The presentation of the Federal questions to the Supreme Court of Virginia is not controlled solely by the form of the

question posed in the brief, but the entire argument must be considered in determining whether the Federal questions have been presented. It inescapably follows that in connection with the whole issue of withdrawing the guilty plea, there was presented to the Supreme Court of Virginia not only the abuse of discretion argument, but also the constitutional arguments under the Fifth and Sixth Amendments as a result of the conflicting position of the petitioner's trial counsel in the dual role of a fact witness and advocate plus his admission to the Court that he had not adequately advised the petitioner on the issues with respect to the hearing on the motion to suppress.

In *Bacheeleer* v. *Maryland,* 90 S.Ct. 1312, 397 U.S. 564, the Supreme Court stated:

> "When a claim of a constitutionally protected right is involved it 'remains our duty . . . to make an independent examination of the whole record'." *Cox* v. *Louisiana,* 379 U.S. 536, 85 S.Ct. 453.

If there is any doubt as to whether the judgment of the Supreme Court of Virginia is predicated on the non-Federal ground, which in this case would be the simple argument that the trial judge abused his discretion, or whether it also resolved the Federal question involving the Fifth and Sixth Amendments this court has in the past vacated the judgment of the State Court and remanded the cause to that court for further proceedings to determine whether the Federal question was resolved by the highest state appellate court. See, *California* v. *Krivda,* 93 S.Ct. 32, 409 U.S. 33. In *Department of Mental Hygiene of California* v. *Kirchner,* 380 U.S. 194, 85 S.Ct. 871, this Court stated:

> "While we might speculate from the choice of the words in the opinion and the authorities cited by the court which provision was the basis for the

judgment of the state court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent non-Federal ground. . . ."

* * *

"This Court is always wary of assuming jurisdiction of a case from a state Court unless it is plain that a Federal question is necessarily presented and the party seeking review here must show that we have jurisdiction of the case. . . . For reasons that follow we conclude that further clarifying proceedings in the California Supreme Court are called for under the principle stated in *State of Minn.* v. *National Tea Co.,* 309 U.S. 551, 60 S.Ct. 676."

While the petitioner's brief to the State Supreme Court of Virginia could certainly have been more precise in referring specifically to the Fifth and Sixth Amendments, the entire argument presented these issues and we must presume that the Supreme Court of Virginia read and passed on all the issues raised in the argument.

In the event there is any doubt in the court's mind as to whether the Supreme Court of Virginia did pass on the Federal question posed under the Fifth and Sixth Amendments, and if the Court feels there is an ambiguity as to whether the appeal was decided solely on the non-Federal grounds involving the alleged abuse of discretion, then this Court should follow its pronouncement in *State of Minn.* v. *National Tea Co.,* 309 U.S. 551, 60 S.Ct. 676, and *Department of Mental Hygiene of California* v. *Kirchner,* 380 U.S. 194, 85 S.Ct. 871, and vacate the judgment of the Supreme Court of Virginia, remand the cause to that court with directions to clarify whether their denial of the appeal

resolved the Federal question raised by the Fifth and Sixth Amendments or whether their judgment was predicated solely on other independent state grounds.

We feel that a reading of the Petition on Appeal to the State Supreme Court of Virginia substantially raised arguments under the Fifth and Sixth Amendments to that court such that they can properly be presented to this Court for judicial review.

CONCLUSION

We ask this Court upon consideration of the briefs, to grant the petition for certiorari, but in the event this court harbours any doubts with respect to whether the Federal question was presented and decided by the Supreme Court of Virginia, we ask this Court to remand the cause to the Supreme Court of Virginia with directions to clarify whether the Federal question on the basis of the court's judgment or whether it rested on other independent state grounds.

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